IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

THURSDAY, THE 4TH OCTOBER 2007 / 12TH ASWINA 1929

CRL.A.No. 762 of 1999(C)

CC.1/1998 of ENQUIRY COMMISSIONER & SPECIAL JUDGE, THRISSUR

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APPELLANTS/ACCUSED 2 AND 3:

1.K.C. ARUMUGHAN, FORMER MEMBER,
VANDIPERIYAR GRAMA PANCHAYAT,
DYMUKKU, PUTHUVAL.

2.K.C. DAMODARAN, SON OF KALIMUTHU,
AMBEDKAR GRAMAM, KURISUMODU, PUTHUVAL,
DYMUKU, VANDIPERIYAR.

BY ADV. SRI.A.N.RAJAN BABU

RESPONDENT/COMPLAINANT:

THE STATE OF KERALA, REPRESENTED BY THE DEPUTY
SUPERINTENDENT OF POLICE, VACB, IDUKKI, THODUPUZHA.

BY PUBLIC PROSECUTOR SRI. PUZHAKKARA MOHAMMED.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 4.10.2007, THE COURT ON 04/10/2007 DELIVERED THE FOLLOWING:

ORDER IN CRL.M.P. NO. 4160 OF 1999 IN CRL. APPEAL NO. 762 OF 1999.

DISMISSED

4.10.2007 Sd/-(K.THANKAPPAN, JUDGE)

K.THANKAPPAN, J.

CRL. APPEAL NO.762 OF 1999

Dated this the 4th day of October, 2007

JUDGMENT

The appellants are the second and third accused in C.C. No.1 of 1998 on the file of the Enquiry Commissioner and Special Judge, Thrissur. They faced trial along with the first accused for the offence punishable under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 (hereinafter referred to as "the P.C. Act") read with Section 34 I.P.C. The first accused also challenged the judgment of the trial court in Crl. Appeal No.765 of 1999, but during the pendency of the appeal, the first accused died and as per judgment dated 22.3.2006, the said appeal was dismissed as abated.

2. The charge against the appellants herein and the first accused was that while the first and second accused were holding the office respectively as President and member of Vandiperiyar Panchayat and the third accused being the nominee approved by the said Panchayat for the construction work of a library building at Dymukku under the Jawahar Rozgar Yojana

Scheme (for short "the J.R.Y. Scheme"), the first and second accused illegally advanced an amount of Rs.60,000/- by way of four cheques to the third accused for the execution of the said work without assessing the progress of the construction work and allowed the third accused to retain a substantial amount as advance and thereby abused their official position as public servants with the dishonest intention of obtaining undue pecuniary advantage for the third accused. To prove the case against the appellants and the first accused, the prosecution examined PWs.1 to 13 and produced Exts.P1 to P26. On the side of the defence, DWs.1 to 3 were examined, but no documents were produced. After closing the prosecution evidence, the accused were questioned under Sections 313 Cr.P.C. They denied the charge levelled against them. The first accused stated that while the construction work was in progress, the Vigilance Department seized the entire records and that though he approached the authorities for getting the files, the same were not returned. He further stated that as the beneficiaries submitted a memorandum, the third accused was allowed to proceed with the work, but due to the escalation in the cost of materials and other expenses, the third accused was not prepared to proceed with the work and remitted back the balance amount of advance which he received from the Panchayat. The appellants herein also had taken the same stand as that of the first accused. However, after considering the

entire evidence, the trial court found all the three accused guilty under Section 13(1)(d) read with Section 13(2) of the P.C. Act read with Section 34 I.P.C., convicted them thereunder and sentenced them each to undergo rigorous imprisonment for one year and to pay a fine of Rs.15,000/- each and in default of payment of fine, to undergo rigorous imprisonment for a further term of one year each. The above conviction and sentence are challenged in this appeal by the second and third accused.

3. This Court heard the learned counsel appearing for the appellants as well as the learned Public Prosecutor.

4. Sri. A.N.Rajan Babu, learned counsel appearing for the appellants has raised the following contentions before this Court in challenging the findings entered and the conclusions arrived at by the trial court: (i) the trial court misread the evidence adduced by the prosecution to find the appellants guilty of the charges framed against them as there is no legally acceptable evidence to show that the appellants had committed any misconduct as contemplated under Section 13(1)(d) of the P.C. Act, (ii) even accepting the prosecution evidence, the charge framed against the appellants has not been proved beyond reasonable doubt as it can be seen that the first and second accused, being the President and member of the

Panchayat, only acted on the basis of the resolutions passed by the Panchayat committee and (iii) Ext.P26 minutes and the resolutions passed by the Panchayat committee would show that both the first and second accused were allowed to advance amounts to the third accused for the construction work and if so, the first and second accused had not violated any rule or regulation of Ext.P15 circular.

5. The facts of the case are not disputed before this Court. First of all, this Court shall look into the charge framed against the appellants and the first accused: The charge reads as follows:

> "That you d1st and 2nd accused while holding respectively the office of President and member of Vandiperiyar Panchayath and you third accused being a nominee approved by the said Panchayath for the construction work of a Library building at Dymukku under the Jawahar Rozgar Yojana Scheme (J.R.Y. Scheme) and as such being Public Servants have by abusing your official position as such public servants colluded together and with the common intention of obtaining undue pecuniary advantage to you the 3rd accused Damodaran, you 1st and 2nd accused have illegally paid a total sum of Rs.60,000/- as advance for the execution of the said work (Rs.15000/- as per cheque No.06870 dated 28-9-91, Rs.10,000/- as per cheque No.28661 dated 11-10-91, Rs.10,000/- as per cheque No.28670 dated 29-10-91 and Rs.25000/- as per cheque No.28839 dated 17-12-91) without assessing the

> progress of the said construction work under execution by the Nominee and you accused 1 & 2 have thereby allowed the 3rd accused /nominee to retain a substantial amount of advance and to misutilise the unspent portion of the advance amounting to Rs.54665.10 Ps. till the month of July 1994 and thereby committed offences punishable u/s 13(1)(d) of the P.C. Act, 1988 r/w sec.13(2) thereof and Section 34 I.P.C. all within the cognizance of this Court."

A reading of the above charge would show that the first and second accused allowed the third accused - nominee to retain a substantial amount of advance and to misutilise the unspent portion of the advance amounting to Rs.54,665.10 till July, 1994 and thereby committed the offence alleged.

6. Admittedly, the construction work of the library building was assigned to the third accused, the second appellant herein, who was nominated by the beneficiary committee and approved by the Panchayat. Further, it can be seen from Ext.P1(a) agreement signed by the third accused that no time limit was fixed for the completion of the work and the estimated amount for the work was Rs.1,00,000/- which would be met from the J.R.Y scheme. The advance amount was paid by way of cheques signed by the second appellant. The third accused started the work on the direction issued by the Assistant Engineer, Block Development Officer

and the Supervisors of the Panchayat. It is also seen from Ext.P21 F.I.R. that Crime No.1 of 1993 was registered against the accused by the Vigilance police, Idukki on the basis of a complaint filed by one Jose Parappuram, President of the Peerumede Taluk Consumers' Samrakshana Samithi, Vendiperiyar, alleging that they abused their official position as public servants and allowed the third accused to misappropriate Government money to the tune of Rs.1,52,000/-. On the basis of Ext.P21 F.I.R, the case was investigated and charge sheeted. It is under the above background that this Court should consider the contentions of the learned counsel appearing for the appellants and see whether the findings entered by the trial court are justifiable or not.

7. The trial court mainly relied on the evidence of PW1. who was the Junior Superintendent of Vandiperiyar Panchayat during the relevant time. He had stated that the construction work of the library building was entrusted to the third accused as per Ext.P1(a) agreement. He proved Ext.P1(b) containing the order of the first accused to make the advance payment to the third accused. This witness also stated that Exts.P1(d), P1 (e), P1(f) and P1(g) were office copy of the bills which shows the first, second, third and the fourth advance made to the third accused. He further stated that Ext.P3 series were the cheques issued under Exts.P1(d) to P1

(g) bills. He also stated that the signatures in Exts.P3 to P3(c) cheques were that of the first and second accused and that the receipts were in the handwriting of the third accused. This witness further stated that the advance payments made to the third accused were recorded in Ext.P7 cash book. He also admitted that the first and second accused were looking after the construction work being done by the third accused and that as per Exts.P13 and P14 resolutions of the Panchayat committee, the first and second accused were allowed to give advance payment to the third accused for the construction work. PW.1 also stated that as the Vigilance police registered a case, the entire work done by the third accused was measured .

8. The Assistant Executive Engineer, D.R.D.A., Idukki was examined as PW.2. He stated that he had given the technical sanction for the construction of the building. He proved Ext.P16 sanction order. PW.3, who was the Assistant Executive Engineer of P.W.D. (Roads), Sub Division, Thodupuzha during the relevant time stated that he inspected the work in issue on 19.7.1994 at the request of the Deputy Superintendent of Police, Vigilance, Idukki and gave Ext.P17 report which shows that the total cost of work done as on the date of inspection was only Rs.5,334.90. PW.4, the Overseer who inspected the work prior to 15.10.1992 stated that as per Ext.P18(a) valuation report given by him, the total cost of work

done was only Rs. 7689.98. This witness also stated that materials were stocked at the site for the construction work. PWs.5, 6 and 7 were examined to prove the advance payments made to the third accused by the first and second accused. They supported the evidence of PW.1 with regard to the handwriting in the bills pertaining to the advance made to the third accused . PW.8 was examined to prove Ext.P19 sanction order for prosecuting the accused. PWs.9 and 10 were examined to prove the advance payments made to the third accused and also the measurements of the work done by the third accused. PW.10 had also admitted that the third accused had stocked materials at the work site for construction of the building. PW.11 was the Deputy Superintendent of Police, Vigilance, Idukki during the relevant time. He stated that he conducted preliminary enquiry regarding the disputed work and also took into custody Exts.P1, P4 to P9 and P18 records. This witness also stated that he completed the investigation and filed the charge before the court. PWs.12 and 13 were the police officers who conducted part of the investigation and questioned some of the witnesses.

9. From the evidence of these witnesses, it can be seen that the third accused was entrusted with the work of construction of the building for the library as per Ext.P1(a) agreement. PW.1 had admitted that the

conduct of the work under the J.R.Y scheme and the amount to be expended for the work were mentioned in Ext.P15 circular and that as per Ext.P15, all the registers and records relating to work under the J.R.Y scheme shall be kept by the Panchayat. It is also stated in Ext.P15 that 50% of the estimated amount can be given as advance and that before giving the advance payment, the Panchayat should verify the work already completed and also see that the amount sanctioned for the work is not misused. Further, it is recorded in Ext.P12 minutes of the Panchayat for the period from 26.3.1991 to 12.3.1992, that the third accused was nominated for the work. It is also to be noted that as per Exts.P13 and P14 resolutions of the Panchayat committee, the first and second accused were empowered to advance amount to the third accused for construction of the building. As per the above resolutions, the contractors were directed to remit the balance amount and that such an intimation was given to the third accused also. Further, as per Ext.P26 minutes of the Panchayat dated 28.1.1994, it is seen that the third accused intimated that he could not complete the work with the allotted amount and hence he was not in a position to continue the work and, therefore, decision was taken to terminate the work entrusted with the third accused. The third accused was also directed to remit back the amount which he had received as advance. In the light of the above facts, this Court has to see whether the

charge framed against the appellants is sustainable or not.

10. The specific case of the prosecution was that the first and second accused had given an amount of Rs.60,000/- as advance to the third accused without verifying the work already done by him which is against the rules and regulations contained in Ext.P15 circular and that the said amount was in excess of the amount permitted as per Ext.P12 minutes and that the third accused retained the unspent amount of Rs.54,665.10 and thereby all the three accused committed the misconduct of obtaining undue pecuniary advantage. Admittedly, as per Exts.P12 and P15, the first and second accused were permitted to give 50% of the estimated amount as advance to the third accused. If so, the question to be considered is whether the Panchayat had taken steps to terminate the agreement as the third accused had abandoned the work. As per Ext.P26, the Panchayat had taken a decision to terminate the contract of the third accused and to entrust the work on a revised estimate. If so, the facts now proved would show that advancing of 50% of the estimated amount to the third accused by the first and second accused was not with any dishonest intention of obtaining undue pecuniary advantage for themselves or for the third accused. The term "obtains" as used in Section 13(1)(d) of the P.C. Act is with a firm connotation of a positive action with dishonest intention

by a public servant to get pecuniary advantage. In this context, the learned counsel appearing for the appellants brought to the notice of this Court the decision of the Apex Court reported in **Ram Krishan v. Delhi State, A.I.R. 1956 S.C.476.** In the above judgment, the Apex Court while dealing with Section 5(1)(d) of the Prevention of Corruption Act, 1947 held that "**before convicting an accused, there must be proof that the public servant adopted corrupt or illegal means and thereby obtained for himself or for any other person any valuable thing or pecuniary advantage."** The Apex Court further held that "**the word "obtains" does not eliminate the idea of acceptance of what is given or offered to be given, though it connotes also an element of effort on the part of the receiver."**

11. Further, it can be seen that the charge framed against the first and second accused was that they advanced an amount of Rs.60,000/- to the third accused without assessing the work done by him . Since the first and second accused were permitted to advance amount for the construction work, as per the resolutions passed by the Panchayat, their action will not amount to any misconduct as contemplated under Section 13(1)(d) of the P.C. Act. It may at the most amount to dereliction of duty by a public servant and such dereliction is not contemplated under Section 13(1)(d) of

the P.C. Act. In this context, the learned Public Prosecutor placed reliance on the decision of the Apex Court reported in **Bipin Chandra v. Republic of India, 1964 (1) Crl. L.J. 688** wherein the Apex Court had considered the offence punishable under Section 5(1)(c) of the Prevention of Corruption Act, 1947. Relying on the above judgment, the learned Public Prosecutor submits that if the offence does not come under Section 13(1)(d) of the P.C. Act, it will come under Section 13(1)(c) of the P.C. Act. But, there was no charge for temporary misappropriation of Government money as contemplated under Section 13(1)(c) of the P.C. Act against the first and second accused and the principles laid down in the said judgment are not applicable in the case of the third accused. As there was no charge under Section 13(1)(c) of the P.C. Act, the contention of the learned Public Prosecutor is not tenable.

12. The next question to be considered is whether the third accused had retained Government money which he had not spent for the construction work. In this context, this Court had already found that the first and second accused were permitted to advance 50% of the estimated amount to the third accused for the construction of the building. It has also come out in evidence that the third accused had intimated the Panchayat that he cannot continue the work with the amount already

sanctioned due to escalation in the cost of materials and other labour charges. If that be so, it was the duty of the Panchayat to terminate the contract of the third accused within time. This Court has already verified Ext.P1(a) agreement and it is seen that no time limit was prescribed for the completion of the work. Further, it was only as per Ext.P26 dated 28.1.1994 that the Panchayat had taken steps to terminate the contract and submit fresh tender. If so, retaining of the amount by the third accused also would not come under the misconduct contemplated under Section 13 (1)(d) of the P.C. Act. The trial court considered this aspect and found that though Section 5(1)(d) of the Prevention of Corruption Act, 1947 corresponds to Section 13(1)(d) of the P.C. Act, 1988, after the amendment brought to the Prevention of Corruption Act, there is a difference in the definition of criminal misconduct. Section 13(1)(d) of the P.C. Act reads as follows:

> "13. **Criminal misconduct by a public servant.--** (1) A public servant is said to commit the offence of criminal misconduct,--
>
> xx xx xx xx
>
> (d) if he,--
>
> (i) by corrupt or illegal means , obtains for himself or for any other person any valuable thing or pecuniary advantage; or

> (ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or
>
> (iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest."

Criminal misconducts of a public servant are narrated in the above three clauses. Even though the third accused retained the unspent amount of the advance given to him by the first and second accused, he remitted back the balance amount when steps were taken by the Panchayat during the year 1994 to terminate the contract. Hence, the action of the third accused does not amount to any misconduct as contemplated under Section 13(1) (d) of the P.C. Act. In this context, the learned counsel appearing for the appellant has brought to the notice of this Court the decision of the Apex Court reported in **M. Narayanan v. State of Kerala, 1963 (2) Crl. L.J 186.** In the above judgment, the Apex Court, while dealing with a case under Section 5(1)(d) of the Prevention of Corruption Act, 1947, held as follows:

> " The juxtaposition of the word 'otherwise' with the words 'corrupt or illegal means' and the dishonesty implicit in the word "abuse" indicate the necessity for a dishonest intention on the part of the public servant to bring him within the

meaning of the clause."

The same principle can be adopted in the facts of the case on hand. From the facts now proved, it can be seen that the first and second accused advanced an amount of Rs.60,000/- to the third accused and that the third accused retained a substantial amount of the advance with the desire to complete the work as per Ext.P1(a) agreement and subsequently remitted back the amount when the contract was terminated by the Panchayat. That being so, the finding of the trial court that the prosecution had succeeded in proving the charge against the appellants and the first accused is not based on any legally acceptable evidence.

13. In the light of the discussion made in this judgment, this Court is of the view that the finding of the trial court is not sustainable. The impugned judgment is, therefore, set aside and the appellants are acquitted of the charge levelled against them.

The Crl. Appeal is accordingly allowed. The bail bonds executed by the appellants shall stand cancelled.

(K.THANKAPPAN, JUDGE)

sp/

K. THANKAPPAN, J.

CRL.A. NO.762/1999

JUDGMENT

4th OCTOBER, 2007